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and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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DEPARTMENT OF THE TREASURY
U.S. Customs Service

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U.S. Customs Service

(T.D. 74-290)

Liability of vessel entry bond for foreign vessel repairs

Bond posted for vessel's entry includes obligation for duty on foreign vessel repairs

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 14, 1974.

The text of the opinion by the United States Court of Appeals, Fifth Circuit, dated April 26, 1974, in *United States* v. *Leola Studdert Gissel, et al.*, and *United States* v. *C. J. Thibodeaux and Company and Travelers Indemnity Company* is set forth below. The opinion affirms a decision of the United States District Court for the Southern District of Texas set forth in Treasury Decision 73-86.

The Fifth Circuit held that in view of the broad language used in the vessel bond, Customs Form 7569, which includes four paragraphs referring to duties, and the fact that the bond is specified in section 4.14(b), Customs Regulations, as suitable for covering duty due under title 19, United States Code, section 1466, that bond does cover duty under section 1466. An application for a permit to unlade on Customs Form 3171 requesting only certain services does not modify the bond. While there is no statutory liability upon a vessel agent for duty under section 1466, if an agent voluntarily gives a bond covering the obligations of its principal, the bond is enforceable. The vessel agent cannot claim that permitting the vessel to clear under section 4.14(b) without the payment of duty under section 1466 discharged its liability under the bond since the very purpose of furnishing a bond under section 4.14(b) is to permit the vessel to clear without the payment of duty at that time.

(VES-13-18)

LEONARD LEHMAN,
Assistant Commissioner,
Regulations and Rulings.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LEOLA STUDDERT GISSEL, EXECUTRIX OF THE ESTATE OF JULIUS SCHUTZE GISSEL, ET AL., *Defendants-Appellants.*

AND

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

C. J. THIBODEAUX AND COMPANY AND THE TRAVELERS INDEMNITY COMPANY, *Defendants-Appellants.*

United States Court of Appeals, Fifth Circuit, April 26, 1974.

No. 73-2829.

Before: ALDRICH, Senior Ct. J.* and BELL and GEE, Ct. JJ.

Appeal from the United States District Court for the Southern District of Texas, CARL O. BUE, JR., D. J. 1973 AMC 621. Affirmed.

BAILEY ALDRICH, Senior Ct. J.:

These are two consolidated actions arising out of the bankruptcy and the consequent failure of the owners of an American vessel, the S.S. *Sea Pioneer*, to pay customs duties imposed by virtue of 19 U.S. Code, sec. 257 [1] on entry following repairs made in a foreign country. Defendants Gissel and Thibodeaux,[2] are so-called berthing agents whose business it is to make arrangements for entry, docking, attendance of customs agents, etc. and clearance, on behalf of vessels entering United States ports where they offer their services. In connection therewith each defendant annually files a blanket bond specified to apply to all vessels entered and cleared by them in the course of the year. The government is the obligee. In May 1964, the S.S. *Sea Pioneer* docked at Port Arthur, Texas, using Gissel's services. Having been repaired while abroad, she incurred a duty obligation finally liquidated in 1967 at $14,217. In October 1965, the vessel docked at Galveston, Texas, using Thibodeaux's services, and having again been repaired abroad, incurred a duty obligation finally liquidated in 1968 at $57,674. The owners having become bankrupt without having paid, and the vessel having been sold abroad without satisfying these claims, the government sued defendants on their bonds. The district court found for the government for the penal sum ($10,000) of each bond, and

*Hon. BAILEY ALDRICH, Senior Circuit Judge of the First Circuit, sitting by designation.

[1] Now 19 U.S. Code, sec. 1466.

[2] Strictly, Gissel, formerly d/b/a Collin & Gissel, is now deceased and is represented by his executrix, and Thibodeaux is C.J. Thibodeaux & Co. Also named defendants, but not embraced in that term as used herein, are two indemnity companies that signed Gissel's and Thibodeaux's bonds as sureties.

defendants appeal. In a nutshell, it is defendants' position that their bond covers only obligations for routine services rendered while the vessel was in port, and which they specifically requisitioned by executing Customs Form 3171, while the government claims that it covers the whole spectrum of the vessel's liability.

At least at first blush the government appears correct. The bonds, executed on Customs Form 7569, provided,

> "(1) If the above-bounden principal shall pay to the collector of customs of said port(s) promptly on demand such penalties as may be incurred by the vessels, vehicles, or aircraft, together with the sums chargeable under law and regulations for such services as may be performed for said vessels, vehicles, or aircraft by customs officers or employees, and *shall promptly pay any duties*, charges, exactions, penalties, or other sums found legally due the United States from any master or other proper officer or owner of said vessels, vehicles, or aircraft on account of said vessels, vehicles, or aircraft." (Emphasis suppl.)

Defendants contend, (a) that the bond does not in terms cover the duty imposed on account of foreign repairs; (b) that even if the form of the bond does in terms purport to cover such duties, in the context of its execution they were not covered when a berthing agent, rather than the vessel, was the party executing it; and (c) that in any event, although executing the bonds as principals, as between themselves and the vessel the agents were only sureties, and affording an extension to the vessel effected their discharge. Consideration of these defenses requires examination of the total circumstances.

Pursuant to statutory authority, 19 U.S. Code, secs. 1623, 1624, the Treasury Department adopted regulations under which an entering vessel itself, or by its agent, must apply for customhouse and attendant services and give bond for payment. It is further provided that, if a vessel wishes to clear without payment of duty resulting from foreign repairs, it must make a deposit or give bond for such. 19 C.F.R., sec. 4.14. Defendants' contention that the bonds which they signed did not in terms cover such duties, based on a construction they seek to give the prefatory "whereas" clauses, is not only unpersuasive in itself in view of the breadth of language, including the fact that there are four paragraphs in the bond referring to duties, but is firmly rebutted by the fact that the bond form which defendants signed, No. 7569, is particularly specified in 19 C.F.R., sec. 4.14 as suitable for covering the duty due on account of repairs. Defendants' point, accordingly, must be that for some reason, although they signed such a broad bond, the intent was for their liability to be limited to only some, and not this portion, of the bond's apparent undertakings.

Nothing in the language of the bond suggests a limitation. Nor did defendants' later applications for permits to unlade the S.S. *Sea Pioneer*, requesting only certain services, modify the bonds, which on their face applied *in toto* to any vessel "entered and cleared" by defendants. It is true, as defendants assert, that there is no statutory liability imposed upon a berthing agent for customs duties. Correspondingly, the statute provides that for such services as, concededly, are normally ordered by an agent, a bond shall be given by the "master, owner, or agent of such vessel," 19 U.S. Code, sec. 1451, whereas a duty bond is merely required to be "given," with no mention made of agents. 19 C.F.R., sec. 4.14. It does not follow, however, that if an agent voluntarily gives a bond which in terms covers obligations of his principal, it should be unenforceable.[3] We see no reason why an agent may not furnish credit as a service to his principal if he wishes to. *Cf. Caldwell Shipping Co.* v. *United States*, 53 Cust. Ct. 311 (1964) (payment of duty by agent).

It must equally follow that, since the very purpose of furnishing a duty bond is to permit the vessel to clear without paying the duty, the agent cannot claim that permitting the vessel to depart was an unconsented-to release of the security, or extension of credit to the principal, which discharged the surety. Nor are we persuaded by the argument that the government should have proceeded with more dispatch against the vessel. It may be, as defendants suggest, that berthing agents were never charged for uncollectible duty before, but, as the district court held, this does not mean that the liability was not clearly undertaken. We find no ambiguity in the instrument itself, or in the surrounding circumstances.

Affirmed.

(T.D. 74-291)

Cotton textiles—Restriction on entry

Restriction on entry of cotton textiles and cotton textile products in all 64 categories manufactured or produced in the Federative Republic of Brazil

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C., November 18, 1974.

There is published below the directive of November 7, 1974, received by the Commissioner of Customs from the Chairman, Committee for the Implementation of Textile Agreements, concerning visa require-

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[3] For doubtless good and sufficient reason, Gissel and Thibodeaux do not claim that, as they were agents of a disclosed principal (the vessel or its owners), under agency principles the principal was the party chargeable and they were not. We do not, accordingly, pursue this question.

ments for cotton textiles and cotton textile products in categories 1 through 64 manufactured or produced in the Federative Republic of Brazil. This directive further amends but does not cancel that Committee's directive of June 29, 1972 (T.D. 72-200).

This directive was published in the Federal Register on November 12, 1974 (39 FR 39906), by the Committee.

(QUO-2-1)

R. N. MARRA,
Director,
Duty Assessment Division.

THE ASSISTANT SECRETARY OF THE TREASURY
WASHINGTON, D.C. 20230

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

November 7, 1974.

COMMISSIONER OF CUSTOMS
Department of the Treasury
Washington, D.C. 20229

DEAR MR. COMMISSIONER:

This directive further amends, but does not cancel, the directive of June 29, 1972 from the Chairman, Committee for the Implementation of Textile Agreements, that directed you to prohibit, under certain specified conditions, entry into the United States for consumption and withdrawal from warehouse for consumption of cotton textiles and cotton textile products in Categories 1 through 64, produced or manufactured in the Federative Republic of Brazil, for which that Government had not issued an appropriate visa. One of the requirements is that each visa include the signature of a Brazilian official authorized to issue visas.

Pursuant to the provisions of the Bilateral Cotton Textile Agreement of October 23, 1970, as amended, between the Governments of the United States and the Federative Republic of Brazil, and in accordance with the provisions of Executive Order 11651 of March 3, 1972, the directive of June 29, 1972 is further amended, effective on November 18, 1974 to authorize the following Brazilian officials to issue visas, in addition to those previously designated in our letter of January 25, 1974:

Eduardo Jose Ferreira Barnes
Luiz Ramina
Publio Jackson Furiatti
Renato de Arruda Penteado Junior

The actions taken with respect to the Government of the Federative Republic of Brazil and with respect to imports of cotton textiles and cotton textile products from Brazil have been determined by the Committee for the Implementation of Textile Agreements to involve foreign affairs functions of the United States. Therefore, the directions to the Commissioner of Customs, being necessary to the implementation of such actions, fall within the foreign affairs exception to the rule-making provisions of 5 U.S.C. 553. This letter will be published in the Federal Register.

Sincerely,

SETH M. BODNER,
Chairman, Committee for the Implementation of Textile Agreements, and Deputy Assistant Secretary for Resources and Trade Assistance U.S. Department of Commerce

Decisions of the United States Court of Customs and Patent Appeals

(C.A.D. 1136)

SEARS, ROEBUCK AND CO. v. THE UNITED STATES No. 74–23
(—F. 2d—)

1. CLASSIFICATION—JEWELRY BOXES

Customs Court decision overruling importer's claim for classification of imported jewelry boxes as jewelry boxes of wood within item 204.50, Tariff Schedules of The United States (TSUS), and approving classification as articles not specially provided for of a type used for household use, of metal, within item 654.20, TSUS, affirmed.

2. CONSTRUCTION—CHOICE OF LANGUAGE

If Congress has made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators. *Barr* v. *United States*, 324 U.S. 83, 90 (1945).

3. CHIEF VALUE

Item 204.50, TSUS, is limited by the definitions in TSUS General Headnote 9(f) to boxes in chief value of wood.

United States Court of Customs and Patent Appeals,
November 14, 1974

Appeal from United States Customs Court, C.D. 4492

[Affirmed.]

Lane, Young & Fox, attorneys of record, for appellant. *Peter Jay Baskin* and *Ellsworth F. Qualey* (Rode & Qualey) of counsel.

Carla A. Hills, Assistant Attorney General, *Andrew P. Vance*, Chief Customs Section, *John J. Mahon* for the United States.

[Oral argument on October 2, 1974 by Peter Jay Baskin for appellant and by John J. Mahon for appellee]

Before MARKEY, *Chief Judge*, RICH, BALDWIN, LANE and MILLER, *Associate Judges*.

LANE, Judge.

[1] This is an appeal from the judgment of the United States Customs Court reported at 71 Cust. Ct. 168, C.D. 4492, 371 F. Supp.

563–239—74——2

1073 (1973), denying appellant's motion for summary judgment, granting appellee's motion for summary judgment, and overruling appellant's claim for classification of certain imported jewelry boxes within item 204.50, Tariff Schedules of the United States (TSUS), as jewelry boxes of wood. We affirm.

Involved in the controversy are jewelry boxes with metal musical movements which are wound by a key. The jewelry boxes were classified in item 654.20 TSUS. The relevant statutory provisions are:

	Jewelry boxes, silverware chests, cigar and cigarette boxes, microscope cases, tool or utensil cases, and similar boxes, cases, and chests, all the foregoing of wood:
*	* * * * * * *
	Other:
*	* * * * * * *
204.50	Lined with textile fabrics * * *
*	* * * * * * *
	Articles not specially provided for of a type used for household, table or kitchen use; toilet and sanitary wares; all the foregoing and parts thereof, of metal:
*	* * * * * * *
	Articles, wares, and parts, of base metal, not coated or plated with precious metal:
*	* * * * * * *
654.20	Other * * *

There is no dispute between the parties as to the fact that the metal musical movement is the component material of chief value. The determinative question is whether item 204.50 TSUS is limited by the definitions in TSUS General Headnote 9(f) to jewelry boxes in chief value of wood.

> 9. Definitions.—For the purposes of the schedules, unless the context otherwise requires—
>
> * * * * * * *
>
> (f) the terms "of", "wholly of", "almost wholly of", "in part of" and "containing", when used between the description of an article and a material (e.g., "furniture *of* wood", "woven fabrics, *wholly of* cotton", etc.), have the following meanings:
>
> (i) *"of" means that the article is wholly or in chief value of the named material;* [Emphasis added.]
>
> (ii) "wholly of" means that the article is, except for negligible or insignificant quantities of some material or materials, composed completely of the named materials;

(iii) "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantities of some other material or materials may be present; and

(iv) "in part of" or "containing" mean that the article contains a significant quantity of the named material.

* * * * * * *

Appellant contends these definitions do not apply and that it was not the intent of Congress in enacting the Tariff Schedules of the United States to change existing definitions or rates of duty on individual products.

The Customs Simplification Act of 1954, § 101(a), Pub. L. No. 768, 68 Stat. 1136, 19 USCA 1332 note, directed the Tariff Commission to compile a revision and consolidation of the customs laws to accomplish to the extent practical the following purposes:

(1) Establish schedules of tariff classifications which will be logical in arrangement and terminology and adapted to the changes which have occurred since 1930 in the character and importance of articles produced in and imported into the United States in the markets in which they are sold.

(2) Eliminate anomalies and illogical results in the classification of articles.

(3) Simplify the determination and application of tariff classifications.

Section 101(b) of the Customs Simplification Act of 1954 provided that the Tariff Commission should seek to accomplish these purposes without suggesting changes in any rate or rates of duty on individual products. However, it was also provided that where, in the judgment of the Tariff Commission, the purposes could not be accomplished without such changes, the Commission was authorized to suggest incidental changes in rates. The Commission was required to hold public hearings in connection with any proposed rate changes. In fact, however, the Tariff Commission held public hearings in connection with every proposed schedule of classification *and* the general headnotes and rules of interpretation. It is to be noted that the hearings held by the Tariff Commission were much broader than were actually required. *Tariff Classification Study, Submitting Report* (1960), page 2.[1]

In discussing the general headnotes the Tariff Commission said:

An important feature of the proposed tariff schedules not found in the existing schedules is a system of interpretive headnotes which specify certain special rules of interpretation, define im-

[1] Tariff Commission, *Tariff Classification Study* (1960) (published as a report to the President and the Chairmen of the Committee on Ways and Means of the House and the Committee on Finance of the Senate).

> portant terms, prescribe special procedures, and, in general, clarify the relationships between the various schedules, parts, and subparts and the classification descriptions incorporated therein. These headnotes replace cumbersome provisos and other provisions which intrude on the existing classification provisions and make their interpretation more difficult. Also, they contain much substantive matter presently buried in administrative and judicial rulings and in unwritten customs practices. The effort has been made to place these headnotes in closest proximity to the classification descriptions to which they relate. Thus . . . the most general provisions of all are made general headnotes to the entire set of schedules. [*Submitting Report*, supra, at 9.]

Appellant in reviewing the legislative history, as found in the *Tariff Classification Study, Schedule 2*, supra, pp. 26–27, notes that products within item 204.50 must be "made of wood." Appellant contends that this means that products within item 204.50 need not be in chief value of wood. We do not agree. The statement that products are produced "of wood" does not support appellant's position that "of" as defined in General Headnote 9(f)(i) does not apply to products within item 204.50. In construing a statute the duty of the court is to effect the intention of the legislature, which is to be searched for in the words the legislature has employed and in the legislative history. In view of the statutory language and the history of the statute it appears to us that Congress intended that products within item 204.50 be in chief value of wood. [2] If Congress had made a choice of language which fairly brings a given situation within a statute, it is unimportant that the particular application may not have been contemplated by the legislators. *Barr* v. *United States*, 324 U.S. 83, 90 (1945).

In view of the statutory language and legislative history we hold that [3] item 204.50 TSUS is limited by the definitions in TSUS General Headnote 9(f) to boxes in chief value of wood. Since the metal musical movement is the component material of chief value, the jewelry boxes in controversy cannot be classified under item 204.50.

Appellant further contends that jewelry boxes are *eo nomine* provided for within item 204.50 in a manner which permits the "predominant materials" concept as an exception to the requirement that an article "of" a named material be in chief value of that material. This contention was carefully considered and was rejected by the trial judge. We have considered appellant's arguments and have concluded that we are in full agreement with the opinion of the trial judge in this regard.

The judgment of the Customs Court is *affirmed*.

Decisions of the United States Customs Court

Customs Decisions

(C.D. 4564)

A. N. DERINGER, INC. *v.* UNITED STATES

On Defendant's Motion for Summary Judgment

Port of St. Albans, Court No. 72–12–02490 on American goods returned (revolvers)

[Motion granted.]

(Dated November 5, 1974)

Barnes, Richardson & Colburn (*Joseph Schwartz* of counsel) for the plaintiff.
Carla A. Hills, Assistant Attorney General (*Wesley K. Caine*, trial attorney), for the defendant.

RICHARDSON, Judge: In this case the defendant moves for summary judgment dismissing the action, contending that there is no

triable issue in the case, and that as a matter of law judgment should issue in defendant's favor. The merchandise in issue consists of .38 special caliber revolvers imported from Canada and classified in liquidation upon entry at the port of St. Albans, Vermont, under TSUS item 730.19 or as modified by T.D. 68–9, at the duty rates of 22 *per centum ad valorem* plus $1.40 each of 19.5 *per centum ad valorem* plus $1.26 each, depending upon date of entry. It is alleged in the complaint that the revolvers should be classified as American goods returned, duty free, under TSUS item 800.00.*

In its answer the defendant denies this and all other material allegations of the complaint.

In the moving papers defendant asserts as fact that the merchandise in issued is described on the entry papers as ".38 special caliber Smith & Wesson revolvers", that said revolvers were imported into the United States from Canada in the years 1965 and 1968 for the account of Century Arms, Inc. of St. Albans, Vermont, who purchased them as used .38 caliber Smith & Wesson revolvers, had them "rechambered" to become .38 special caliber Smith & Wesson revolvers, and imported them into the United States as such under Department of State license numbers 00751, 12333, and 13896, that on each of the aforesaid licenses was endorsed the statement [or its equivalent] "Revolvers substantially transformed in accordance with Section 121.02(b), International Traffic of [sic] Arms", and that customs Form 4467 required by 19 C.F.R. § 10.1(a) for merchandise claimed to be American goods returned, was never filed with respect to said revolvers.

These assertions of fact are not refuted by the plaintiff. However, plaintiff asserts as fact that the "rechambering" of the revolvers was not an advancement in value or an improvement in condition, and that the customs officials at the port of entry waived the filing of customs Form 4467.

According to the moving papers the "rechambering" operation to which the imported revolvers were subjected involved the use of a chambering tool to machine out the cylinder bores to .38 special dimension for the accommodation of higher caliber cartridges. The effect of rechambering on the revolvers is stated in the opposing papers as follows:

> The rechambering deepens the original chamber to the extent necessary to accommodate the greater length of the .38 special cartridge, but does not alter the original .38 chamber mouth diameter which is approximately .010 inch oversize. Because of

*An alternative claim for classification of revolvers under TSUS item 806.20 was abandoned; and the reference in the complaint to revolvers is deemed by the parties to cover only the .38 special caliber revolvers and not any other type of revolver which may have been included in the importation.

this, upon firing the .38 special cartridge, excessive expansion or deformation of the cartridge case head occurs, which may cause splitting or rupturing of the case, also escape of powder gases. This would destroy any further utility of the cartridge case for reloading.

The deepening of the original chamber produces a rough, annularly grooved surface which interferes with proper extraction of the fired cases. This is caused by radial expansion of the case into the grooves, which is not entirely compensated for by after-firing contraction. Therefore, when an attempt is made to extract the fired case, there is interference between the grooves and the expanded portion of the case, making extraction too difficult from a practical user's point of view.

Insofar as subsequent use of the original .38/200 cartridge is concerned, the deepening of the chamber produces approximately one-half inch of free travel of the .38 bullet in a passage approximately .015 inch too large in diameter for the bullet. This, in combination with the rough finish just mentioned, produces excessive deformation and disorientation of the projective, resulting in greatly reduced accuracy. [Affidavit dated May 31, 1974 of George C. Nonte, Jr., Maj. Ord. Ret.]

The defendant contends on this motion that the rechambering operation precludes the plaintiff from claiming free entry for the revolvers under item 800.00 because the rechambering in effect transformed the revolvers into foreign articles, calling attention to 22 U.S.C.A., section 1934 (a) and (b) and regulations of the Department of State promulgated thereunder. The plaintiff on the other hand does not dispute the fact that the rechambering of the revolvers resulted in their substantial transformation. Plaintiff contends that the rechambering operation was designed to render the revolvers incapable of further military use, and in fact resulted in the revolvers being of lesser commercial value, and, therefore, not disqualified from free entry because of the rechambering. Additionally plaintiff contents that compliance with the customs regulations concerning the filing of customs Form 4467 was waived by the customs officials at the port of entry because the revolvers were die stamped "Made in the U.S.A.". Thus, plaintiff maintains that the facts underlying its contentions herein pose issues that should only be resolved by trial.

Section 1934(b) reads in relevant part:

(b) As prescribed in regulations issued under this section, every person who engages in the business of manufacturing, exporting, or importing any arms, ammunition, or implements of war, including technical data relating thereto, designated by the President under subsection (a) of this section shall register with the United States Government agency charged with the administration of this section, and, in addition shall pay a registration fee which shall be prescribed by such regulations. Such regulations shall prohibit the return to the United States for sale

> in the United States . . . of any military firearms or ammunition of United States manufacture furnished to foreign governments by the United States under this chapter or any other foreign assistance program of the United States, whether or not advanced in value or improved in condition in a foreign country. *This prohibition shall not extend to similar firearms that have ben so substantially transformed as to become, in effect, articles of foreign manufacture.* [Emphasis added.]

It appears from documents attached to the moving papers that the imported revolvers were formerly .38 caliber Smith & Wesson revolvers of United States manufacture which were shipped to New Zealand under the Lend Lease Act of 1941. Firearms of this caliber were included in the Munitions List designated in regulations promulgated by the Department of State in the years 1965 and 1968 pursuant to section 1934(a). These regulations require the issuance of a license from the State Department as a condition precedent to the importation of listed munitions into the United States, including those of American origin that have been so substantially transformed abroad as to become in effect articles of foreign manufacture.

As to what constitutes substantial transformation section 121.02 of the regulations [in effect in 1965] states in part:

> As used in § 123.03(d) of this subchapter the term "substantially transformed" shall refer to the realteration of firearms abroad to accomplish the following changes:
>
> * * * * * * *
>
> (b) As applied to pistols and revolvers, the changes must have included at least either (1) re-chambering or (2) modification of the cylinders for the accomodation of a lower or higher caliber cartridge. [22 C.F.R. § 121.02.]

Apart from statutory and regulatory considerations, it is well settled that American products that have undergone changes in foreign countries which convert them to new and different uses lose their identity as American products upon their importation into the United States. *United States* v. *Tower & Sons*, 9 Ct. Cust. Appls. 135, T.D. 37981 (1919). The question presented in the *Tower* case was whether imported products derived from tungstic acid exported from the United States could enter this country duty free under paragraph 404 of the Tariff Act of 1913, a predecessor of Item 800.00. In rejecting free entry for the derivatives metal ingots and wire, the Court of Customs Appeals said (p. 138):

> . . . While the intent of Congress to permit free entry of such articles *changed in condition* must be observed, there is no warrant in going so far in that observance as to defeat the limitations afforded by the language of the provisions granting this right of free importation. If the returned articles are manufactured articles the paragraph provides they must be "manufactures of the

> United States" returned after having been exported. These two last classes of merchandise are manufactures, or residues thereof, not of the United States but of Canada, the manufacturing processes, the result of which gives them their names, characters, and uses, whatever they may be, having been applied in Canada. As returned, they are not the same article changed in condition, but different articles produced by different manufacturing processes applied not in the United States but in Canada. The court therefore is of the opinion that they are not entitled to free entry under this paragraph.

In the instant case the uncontroverted evidence presented on the motion discloses that the changes made in Canada on revolvers of unquestioned American manufacture converted them to new and different uses. After the rechambering operation the revolvers were no longer capable of firing with accuracy the .38 caliber bullets which they had been originally designed to fire. Rechambering suited these revolvers to accept and fire the .38 caliber special bullets—bullets with different dimensions and capacities. And this change necessitated a different nomenclature for these revolvers. i.e., .38 special caliber rather than .38 caliber. It follows, therefore, that the imported revolvers, under the principle of the *Tower* case, must be considered to be products of Canada rather than of the United States.

Section 1934(b) and the State Department regulations promulgated thereunder, speaking in terms of substantial transformation as rendering weapons in effect articles of foreign manufacture, affords the court an additional basis for reaching the same conclusion regarding loss of identity as to the imported revolvers.

Inasmuch as the imported revolvers, in the condition in which imported, are products of Canada, it is immaterial whether an advancement in value or improvement in condition has taken place in connection with their conversion in Canada. Advancement in value and improvement in condition are pertinent considerations under item 800.00 only where it is determined under the evidence that the imported merchandise is the merchandise that was exported. *Shell Oil Co. of Canada, Ltd.* v. *United States*, 27 CCPA 94, 98, C.A.D. 68 (1939).

Also, the question of whether compliance with the customs regulations relating to item 800.00 claims was waived poses no issue for the court to decide on this motion. The defendant does not press this objection here, but rather relies wholly on its argument which goes to the merits of the case. The waiver question is procedural in nature and does not go to the merits of the case.

For the reasons stated, the court is in agreement with the defendant that there is no triable issue in the case. On the evidence presented on the motion defendant is entitled to a summary judgment in its favor as a matter of law. Judgment will be entered herein accordingly.

563-239—74——3

(C.D. 4565)

PARKSMITH CORPORATION *v.* UNITED STATES

Memorandum Opinion and Order

Court No. 71-12-01923

Port of New York

[Defendant's motion to sever and dismiss granted.]

(Dated November 6, 1974)

Serko & Sklaroff (*David Serko* of counsel) for the plaintiff.

Carla A. Hills, Assistant Attorney General (*Edward S. Rudofsky*, trial attorney), for the defendant.

WATSON, Judge: Defendant has moved for an order severing eight of the protests in this action and dismissing them on the ground the court lacks jurisdiction, more particularly that the party protesting the classification is not the party which made the entry and that the plaintiff named in the summons and complaint is not the party which entered the merchandise, or which protested its classification. Defendant points out that with regard to the challenged portions of this action the entries were made by "Parksmith, a Div. of Universal Marion Corp." an entity organized and existing under the laws of the State of Florida; the protests were made by "Parksmith Corp. Div. of Universal Marion Corp." and the summons and complaint were made in the name of Parksmith Corp. a corporation organized under the laws of the State of New York.

Neither in its opposition to the motion or in oral argument did plaintiff explain how a New York corporation happens to be in court challenging the tariff treatment of merchandise imported by a Florida corporation. Nor has plaintiff explained how the protests could be valid if they were not brought by the Universal Marion Corp.

Plaintiff has requested that the court issue a written opinion on this matter to provide guidelines on the issue raised. Although the hosts of dismissals without comment in previous "Parksmith" cases might be expected to alert plaintiff to the obvious deficiencies of its presentation, I am willing to be specific. I am dismissing the challenged protests for lack of jurisdiction because plaintiff has not come forward with even a single shred of evidence to clarify the doubts existing with regard to the jurisdiction of the court. Specifically, plaintiff has completely failed to explain why the party making the challenged protests appears to be different from the party entering the merchandise. Plaintiff has completely failed to explain why the plaintiff on

the summons and complaint is not the same party who entered the merchandise. Plaintiff has failed to answer the question, "Why is the party which initiated this action not the same party which imported this merchandise?" Or stated differently, what makes Parksmith Corp. the correct party to bring this action insofar as it relates to the challenged entries?

In sum, my guidelines herein are as follows: If the jurisdiction of the court is challenged, as it has been here by defendant, the plaintiff must prove that jurisdiction exists. In this case it means that plaintiff must prove the existence of facts from which it can be reasonably concluded that the challenged protests were made and ultimately brought to court by the party allowed to do so under the law. Without evidence of any sort, there is no need to discuss cases in which plaintiffs successfully rose to jurisdictional challenges. See for example, *The Diamond Match Company* v. *United States* (*Winter, Wolff & Co., Inc., Party In Interest*), 45 Cust. Ct. 198, C.D. 2223 (1960), *aff'd* 49 CCPA 52, C.A.D. 796 (1962); *Triumph Glove Co.* v. *United States*, 24 Cust. Ct. 221, C.D. 1237 (1950); and *M. de Orlando & Co.* v. *United States*, 38 Treas. Dec. 180, T.D. 38303, G.A. 8325 (1920).

Defendant has argued that plaintiff ought to be estopped from asserting jurisdiction herein by virtue of the multiplicity of prior cases in which, on similar facts, defendant's motion to dismiss was granted. As much as I am inclined to find some drastic and decisive way of giving short shrift to plaintiff's opposition, I do not feel that collateral estoppel applies.

The mechanics of the motion process used therein and the disposition without opinion suggests as a more accurately phrased statement of prior results merely that plaintiff has failed to sustain or prove jurisdiction in the past. This in itself does not necessarily generate a final conclusion regarding jurisdiction but rather a conclusion regarding plaintiff's failure in each instance to adduce the necessary proof.

For the reasons expressed above, defendant's motion to sever protests 1001–1–008860, 1001–1–009789, 1001–1–011958, 1001–1–012198, 1001–1–012508, 1001–1–016547, 1001–1–019250 and 1001–1–021295 from this action and to dismiss the same is granted.

(C.D. 4566)

AMICO, INC. (FORMERLY KNOWN AS: EXHIBIT SALES, INC.)
v. UNITED STATES

Toys—Christmas ornaments

TOYS—SAMPLES

It is especially true in toy cases that the probative effect of a sample import is such as not only to prove the original classification

to have been erroneous, but also to provide a sufficient basis to establish, the propriety of the claimed classification. Thus, here, an examination of a sample illustrative of the importations involved shows that the importations are not toys but rather are Christmas ornaments.

Court No. 70/55493

Port of Philadelphia

[Judgment for plaintiff.]

(Decided November 6, 1974)

Allerton deC. Tompkins for the plaintiff.

Carla A. Hills, Assistant Attorney General (*John A. Gussow* and *Andrew P. Vance*, trial attorneys), for the defendant.

MALETZ, Judge: This case involves the proper tariff classification of merchandise invoiced as an "Inflatable Santa in Ball Christmas wall decoration" that was imported from Hong Kong and entered at Philadelphia, Pennsylvania in 1970. The importations were classified by the government under item 737.40 of the tariff schedules, as modified by T.D. 68–9, as toy figures of animate objects and duty was assessed at the rate of 24 percent ad valorem. The government claims alternatively that the importations are classifiable under item 737.90 of the tariff schedules, as modified by T.D. 68–9, as toys, not specially provided for, which are also dutiable at 24 percent ad valorem.

Plaintiff claims that the imported merchandise is properly classifiable under item 772.97 of the tariff schedules, as modified by T.D. 68–9, as Christmas ornaments, dutiable at the rate of 11.5 percent ad valorem.

The pertinent provisions of the tariff schedules read, as follows:

Classified under:	
Subpart E [Schedule 7, Part 5] headnotes:	
1. The articles described in the provisions of this subpart (except parts) shall be classified in such provisions, whether or not such articles are more specifically provided for elsewhere in the tariff schedules * * *—	
* * * * * * *	
2. For the purposes of the tariff schedules, a "toy" is any article chiefly used for the amusement of children or adults.	
* * * * * * *	

	Toy figures of animate objects (except dolls):	
	Not having a spring mechanism:	
	* * * * * * *	
	Not stuffed:	
	* * * * * * *	
737.40	Other	24% ad val.
	Alternative classification claimed by government:	
	Toys, and parts of toys, not specially provided for:	
	* * * * * * *	
737.90	Other	24% ad val.
	Classification claimed by plaintiff:	
	* * * Christmas ornaments; * * *; all the foregoing * * * of rubber or plastics:	
772.95	Christmas tree ornaments	* * *
772.97	Other	11.5% ad val.

At the outset, it is to be noted that there is a presumption of correctness attendant not only upon the classification of the imported articles under item 737.40 as toy figures of animate objects, but also upon each subsidiary fact necessary to support that conclusion. Since this original classification required a subsidiary finding that the imported articles were, *inter alia*, toys, "[w]hen the government asserted the broader provision, covering toys, in general [i.e. item 737.90], as an alternative to the original classification, it * * * [is] permitted to rely on the presumption of correctness attaching to that subsidiary finding * * *." *United States* v. *New York Merchandise Co.*, 58 CCPA 53, 58–9, C.A.D. 1004, 435 F.2d 1315, 1318–9 (1970).

In this circumstance, plaintiff here has the twofold burden of establishing that the presumptively correct classification of the imported articles as toys was in error and that the articles are properly classifiable under item 772.97 as other Christmas ornaments. In other words, in order to prevail, it is incumbent on plaintiff to prove that the importations were not chiefly used for the amusement of children or adults [1] but rather were chiefly used for ornamental purposes. And in this connection it has been consistently held that articles chiefly used for ornamental, decorative or display purposes are outside the scope of the toy provisions. E.g., *Fred Bronner Corp.* v. *United States*, 57 Cust. Ct. 428, 436, C.D. 2832 (1966); *Louis Marx & Co.* v. *United States*, 65 Cust. Ct. 672, 675, C.D. 4156 (1970).

[1] An object is one of amusement under the tariff schedules if its "purpose * * * is to give the same kind of enjoyment as playthings give, * * * whether the object is to be manually manipulated, used in a game, or * * * worn." *United States* v. *Topps Chewing Gum*, 58 CCPA 157, 159, C.A.D. 1022, 440 F.2d 1384, 1385 (1971).

It is also important to observe that in toy cases it is not uncommon that "the probative effect of the sample imports, themselves, is such as not only to prove the original classification to have been erroneous, but also to provide a sufficient basis to establish the propriety of the asserted classification." *United States* v. *New York Merchandise Co.*, *supra*, 58 CCPA at 59, 435 F.2d at 1319. See also e.g., *United States* v. *Sears, Roebuck & Co.*, 27 CCPA 235, 238, C.A.D. 91 (1940); *New York Merchandise Co.* v. *United States*, 62 Cust. Ct. 38, 41, C.D. 3671, 294 F. Supp. 971, 974 (1969); *Louis Marx & Co.* v. *United States*, *supra*, 65 Cust. Ct. at 674–5; *B. Shackman & Company* v. *United States*, 67 Cust. Ct. 372, 383, C.D. 4300 (1971). Particularly relevant on this aspect is *Wilson's Customs Clearance, Inc.* v. *United States*, 59 Cust. Ct. 36, C.D. 3061 (1967), where the court held, primarily on the basis of the sample imports, that the government's classification of certain nodding head dog-like figures as toy figures of animate objects under item 737.40 of the tariff schedules was erroneous. In finding that the articles were not toys, the court made the following comments that bear repetition here (*id.* at 40–1):

> * * * [A]s is especially true in toy cases, the sample merchandise can offer potent evidence on the question of use, and when in harmony with the other evidence of record, can permit the drawing of inferences as to use nationally. *Fred Bronner Corp.*, *supra*. There is precedent under the two previous tariff acts for viewing sample evidence as sufficiently persuasive to rebut the presumption of correctness on a toy classification and to shift the burden to the defendant. *United States* v. *The Halle Bros. Co.*, 20 CCPA 219, T.D. 45995; *United States* v. *Borgfeldt & Co.*, 13 Ct. Cust. Appls. 620, T.D. 41461.
>
> We are inclined to the view that the present case presents one of those occasions where the sample merchandise itself supplies the necessary persuasiveness to carry the issue for the plaintiff, at least when the presumptive correctness of the collector's classification stands unsupported. The presence of a sharp and rather easily exposed hook renders the merchandise patently unusable by children of tender years. As for those over puberty, the articles represent essentially passive, uncomical, almost nonmanipulatable, yet finely finished replicas of well-known dog species. As such they are eminently suitable for purposes of display or ornamentation, no matter where that may be, and substantially incapable of functioning as objects of play or amusement in any normal or intelligent use. It is not a question of their appearing more suitable for one use than another as was the case in *Fred Bronner Corp.*, *supra*, but of their offering mute testimony of their substantial incapability of use as classified. This type of potent evidence when in harmony with all other evidence presented satisfies the court that a shift in burden on this issue has taken place.

With these considerations in mind, the court must conclude on the basis of an examination of a sample illustrative of the importations

in the present case that the importations are not toys, i.e. articles chiefly used for the amusement of children or adults, but rather are chiefly used for Christmas ornamental purposes.

The sample consists of an inflatable image of a plastic, stylized Santa Claus figure (measuring about 10 inches in length when inflated) which is contained in an inflatable plastic "ball" about 12½ inches high and 8 inches thick when inflated, with the figure attached to the ball by a small tube.[2] The ball has a transparent plastic face or front on which is imprinted in gold, red and green a Santa Claus in a sleigh drawn by eight reindeer. Further, the ball has an opaque white plastic back on the inside of which is inscribed "Merry Christmas." The top, sides and bottom of the ball are also composed of opaque, white plastic, and on the top portion there are imprinted 12 sprigs of green and gold holly leaves with red berries. On the outside back of the ball near the top there is a tab with a hole in it for the purpose of hanging. At the bottom circumference of the ball there is a round disc about 3½ inches in diameter which enables the ball to stand in an upright position. Contained on the back of the ball are two plastic nozzles; one for inflating the Santa Claus figure and the other for inflating the ball.

This sample, with its obvious and pronounced identification with Christmas; with the Santa Claus figure; with the typical Christmas colors (white, gold, green and red); with its reindeer, sleigh and holly sprig designs; with its elaborate decorative effects; with a tab for hanging and a flat bottom disc to enable it to stand upright; identifies it in the strongest way as being an attractive Christmas holiday season decoration and not a toy. In short, it must be concluded from an examination of the sample, that the importations are eminently suitable for purposes of Christmas ornamentation and entirely unsuitable as objects of play or amusement in normal use.

In harmony with the conclusion that the importations are Christmas ornaments and not toys is the testimony of the manager of plaintiff's import department. To the extent relevant, her testimony was to the following effect: She has observed the imported articles' use on a number of occasions in the Philadelphia, Pennsylvania area—and in the States of New York, New Jersey, Illinois and Nevada. In this connection, she had seen the article used only during the Christmas season at which time she observed it in the Christmas decoration departments of various stores and in people's houses where it was suspended by the tab on the back from the ceilings, windows or doorways as a Christmas decoration. She had never seen the article used as a plaything.

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[2] While the article containing the Santa Claus figure is referred to as a "ball," actually its configuration when inflated resembles that of a round cushion or a rounded pill.

Contrary to the foregoing testimony was the testimony of the wife of a Customs Service import specialist at the port of Philadelphia. She testified that one of her five children had received a Santa Claus contained in an inflatable ball as a Christmas present; that her three-year-old and one-year-old child had played with it like a ball and referred to it as a toy; that the article lasted about two weeks after which it started to deflate; and that she had never seen anybody else use the article. This testimony, however, cannot be given much weight considering that the witness had seen the article used by her children for only two weeks. Further, such sporadic use by these children is scarcely decisive of the nature of the article particularly in light of the fact that not everything that a child plays with or that amuses a child is a toy. See e.g., *Illfelder* v. *United States*, 1 Ct. Cust. Appls. 109, 111, T.D. 31115 (1910).

In summary, it is held that the importations in issue are properly classifiable under item 772.97 as other Christmas ornaments. Plaintiff's claim is therefore sustained and judgment will be entered accordingly.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *November 11, 1974.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

VERNON D. ACREE,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/827	Boe, C.J. November 5, 1974	W.T. Grant Co. et al.	74-2-00514, etc.	Item 706.60 20%	Item 774.60 8.5% or 11.5%	Adolco Trading Co et al. v. U.S. (C.D. 4487)	New York Shopping bags

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/828	Boe, C.J. November 5, 1974	Gene Miller, Atwood Imports, Inc.	66/55898	Par. 353 12.5%	Protest dismissed as premature; entry returned to district director for further separate appraisement and classification of merchandise in entry, and liquidation of said entry	Judgment on the pleadings Gene Miller et al. v. U.S. (C.D. 3934)	Los Angeles Wood-working machine (other than a reciprocating gang-saw machine) and accompanying electric motors
P74/829	Richardson, J. November 5, 1974	International Polyethylene Bag Co.	68/57167	Item 772.15 17%	Item 703.72 12.5%	Agreed statement of facts	Los Angeles Shower caps
P74/830	Richardson, J. November 5, 1974	New York Merchandise Co., Inc.	66/3412	Item 651.75 58.80%	Item 651.75 .02¢ ea. plus 12.5%	Import Associates of America et al. v. U.S. (C.A.D. 961)	San Diego Flatware sets, barbeque sets, tool sets, or other similar merchandise
P74/831	Richardson, J. November 5, 1974	New York Merchandise Co., Inc.	68/40905	Item 651.75 30.80%	Item 651.75 .28¢ per dos.	Import Associates of America et al. v. U.S. (C.A.D. 961)	San Diego Tool sets, or other similar merchandise
P74/832	Watson, J. November 5, 1974	Campana Art Products, Inc.	67/83749, etc.	Item 748.20 28%	Item 774.00 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	Philadelphia Artificial flowers, etc.

P74/833	Watson, J. November 5, 1974	Norman Import & Export Co.	67/42011	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of plastic
P74/834	Boe, C.J. November 7, 1974	E. Dillingham, Inc.	72-11-02431	Protest not acted upon, by district director, in compliance with sec. 515, T.A. of 1930, as amended	Civil action premature and subject to dismissal as protest not acted upon in accordance with law; action dismissed; district director ordered to take appropriate administrative action not inconsistent with order	Agreed statement of facts	Alexandria Bay (Ogdensburg) All merchandise
P74/835	Boe, C.J. November 7, 1974	Exhibit Sales, Inc.	72-4-00748	Item 772.95 17.5%	Item 772.97 11.5%	Agreed statement of facts	Philadelphia Rotating lite Santa plaque and 30 lights
P74/836	Boe, C.J. November 7, 1974	Franshaw, Inc., et al.	69/36233, etc.	Item 706.60 20%	Item 774.60 13.5%, 11.5% or 15%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Shopping bags

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/837	Boe, C. J. November 7, 1974	Max Factor & Co.	72-7-01598	Item 774.60 10%	Item 772.20 9%	Judgment on the pleadings	Los Angeles-Long Beach Lipstick covers and lipstick mechanisms, each assessed separately: dutiable as entireties when imported together in equal number
P74/838	Boe, C. J. November 7, 1974	Ross Products, Inc.	69/44723	Par. 397 19%	Par. 353 12½%	Ross Products, Inc. v. U.S. (C.D. 3850)	New York Electrical bird cages
P74/839	Ford, J. November 7, 1974	Creason Corrugating & Machinery Co., Inc.	68/13820	Item 666.25 11.5%	Item 680.60 3%	Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Cast-iron rollers
P74/840	Ford, J. November 7, 1974	Nippon Electric New York, Inc.	70/41204, etc.	Item 684.70 or 685.50 15%, 13% or 12%	Item 685.22 at 12.5%; item 685.25 at 11%, 10% or 8.5% (merchandise covered by protests listed on schedule A attached to order) Actions listed on schedule B at-	Judgment on the pleadings Transamerican Electronics Corp. et al. v. U.S. (C.D. 4405)	San Francisco Earphones

					tached to said order severed from Joined Court No. 70/41204 and dismissed		
P74/841	Ford, J. November 7, 1974	R. W. Smith, a/c Creason Corrugating & Machinery Co., Ltd.	65/22522, etc.	Item 666.25 11.5%	Item 680.58 3%	Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Cast-iron rollers
P74/842	Ford, J. November 7, 1974	R. W. Smith & Co., Inc., a/c CreasonCorrugating & Machinery Co., Inc.	70/14943	Item 666.25 9%	Item 680.60 2%	Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	New Orleans Cast-iron rollers
P74/843	Ford, J. November 7, 1974	R. W. Smith, a/c Ross Machine & Mill Supply, Inc.	68/30470, etc.	Item 666.25 10% or 9%	Item 680.60 2.5% or 2%	Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Cast-iron rollers
P74/844	Ford, J. November 7, 1974	F. B. Vandegrift & Co., Inc.	65/5875, etc.	Item 706.08 20% (items marked "A") Item 684.70 15% (items marked "B")	Item 685.22 12.5% (items marked "A" and "B")	Agreed statement of facts (items marked "A") General Electric Company v. U.S. (C.D. 3887, aff'd C.A.D. 1021) (items marked "B")	Philadelphia Cases imported with and used as containers for radios (items marked "A") Earphones imported with radios (items marked "B")

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P74/845	Richardson, J. November 7, 1974	L&B Products Corp. et al.	66/11874 etc.	Item 657.35 1.275¢ per lb. plus 15%; 1¢ per lb. plus 13.5%; or 1¢ per lb. plus 12% (items marked "A" or "B")	Item 654.00 10%, 9% or 8% (items marked "A") Merchandise incorrectly appraised and liquidated as entireties; appraisements and liquidations void; protests premature and dismissed; entries returned to regional commissioner for purpose of determining value of merchandise (items marked "B")	The Westbrass Company v. U.S. (C.D. 4293) (items marked "A" and "B")	New York Flat sink strainers, sink strainers, duo basket strainers, wash tray plugs, etc. (items marked "A" and "B")
P74/846	Richardson, J. November 7, 1974	L & B Products Corp. et al.	67/4005 (B), etc.	Item 657.35 1.275¢ per lb. plus 15% Item 657.20 17%	Merchandise incorrectly appraised and liquidated as entireties; appraisements and liquidations void; protests premature and dismissed; entries returned to regional	The Westbrass Company v. U.S. (C.D. 4293)	New York Duo strainers, brass & duo basket strainers, etc.

					commissioner for purpose of determining value of merchandise		
P74/847	Richardson, J. November 7, 1974	Mitsubishi International Corp.	71-10-01582	Item 712.49 11%	Item 800.00 Free of duty	Judgment on the pleadings	New York American goods returned (helicopter parts)
P74/848	Richardson, J. November 7, 1974	F. W. Myers & Co., Inc., et al.	66/321, etc.	Item 692.35 11.5%, 10%, 9% or 8%	Item 692.30 Free of duty	U.S. v. F. W. Myers & Co., Inc. (C.A.D. 1097)	Champlain-Rouses Tractors and parts
P74/849	Richardson, J. November 7, 1974	Stanley Roberts, Inc.	65/12804	Items 651.75/ 927.53 95.09%	Items 651.75/ 650.21, 650.49 or 650.57 1¢ ea. plus 17.5%	Decision and judgment U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	New York Sets of knives, forks or spoons with handles composed in part of plastic and in part of stainless steel
P74/850	Richardson, J. November 7, 1974	W. D. Sales Co.	67/46337	Item 685.90 17.5%	Item 685.70 8.5%	Fedtro, Inc. v. U.S. (C.A.D. 1028)	Houston Automobile flasher switches
P74/851	Maletz, J. November 7, 1974	Creative Playthings, Inc.	69/18830, etc.	Item 737.90 31%	Item 737.55 18.5%	Agreed statement of facts	New York Toy building blocks, bricks and shapes
P74/852	Newman, J. November 7, 1974	Wal Rich Corp.	71-12-01901	Item 657.35 $0.08 per lb. plus 10.5%; or $0.07 per lb. plus 9%	Item 654.00 7% or 6%	The Westbrass Company v. U.S. (C.D. 4293)	New York Shower heads or rain heads
P74/853	Re, J. November 7, 1974	Ignaz Strauss & Co., Inc.	67/29789	Item 772.06 17% plus 21¢ per lb.	Item 772.15 17%	Davar Products, Inc. v. U.S. (C.D. 3880)	New York Stacked set of 4 plastic flat bottomed bowls in different sizes and 1 cover for largest bowl

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	UNIT OF VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R74/370	Boe, C. J. November 7, 1974	Mitsui & Co. (U.S.A.), Inc.	72-7-01633	American selling price	$16.50 per kg., net packed	Judgment on the pleadings	Savannah DL alpha tocopheryl acetate of 88% purity
R74/571	Boe, C. J. November 7, 1974	Naftone, Inc.	R69/3306	American selling price	$7.50 per lb.	Agreed statement of facts	New York "Mondur HX" pure

R74/372	Boe, C. J. November 7, 1974	RCA Corporation	72-7-01567	Constructed value	Radios: $10.3804 each, net packed Earphones: $0.07 each, net packed Batteries: $0.02 each, net packed	Judgment on the pleadings	Los Angeles Radios imported together with earphones and batteries
R74/373	Watson, J. November 7, 1974	Mitsui & Co. (USA), Inc.	R70/5149	Export value: Appraised unit price (not including any addition to such price for buying commission), net packed	Not stated	Mitsui & Co. (U.S.A.), Inc. v. U.S. (R.D. 11740)	Mobile Water jet looms and spare or auxiliary parts
R74/374	Watson, J. November 7, 1974	Mitsui & Co. (U.S.A.), Inc.	R70/7272, etc.	Export value: Appraised unit price (not including any addition to such price for buying commission), net packed	Not stated	Mitsui & Co. (U.S.A.), Inc. v. U.S. (R.D. 11740)	New York Water jet looms and spare or auxiliary parts, or parts separately
R74/375	Re, J. November 7, 1974	Marubeni-Iida (America), Inc.	R68/15715, etc.	Export value: Invoice unit price, net packed less ocean freight and marine insurance	Not stated	Agreed statement of facts	Los Angeles Milling machines

Judgment of the United States Customs Court In Appealed Case

NOVEMBER, 7, 1974

APPEAL 5531.—Control Data Corporation *v.* United States.—MEMORY PLANES (PARTS OF ELECTRONIC COMPUTERS), REAPPRAISEMENT OF—CONSTRUCTED VALUE—AMOUNT FOR PROFIT.—A.R.D. 310 Reversed July 25, 1974. C.A.D. 1132.

Appeals to United States Court of Customs and Patent Appeals

APPEAL 75-8.—United States *v.* Geigy Chemical Corp., Sandoz, Inc., and Ciba Chemical & Dye Co.—CHEMICALS (BENZENOID DYESTUFFS), REAPPRAISEMENT OF—ALLOWANCE FOR FORFIT AND GENERAL EXPENSES—UNITED STATES VALUE. Appeal from A.R.D. 321.

In this case, certain benzenoid dyestuffs were imported from Switzerland by the wholly-owned subsidiaries (plaintiffs-appellees) of J. R. Geigy, S.A., Sandoz, Ltd., and Ciba, Ltd., exporters of the merchandise. The parties agree that the proper basis for appraisement is United States value, as defined in section 402(c), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956. The only elements of the appraised value in dispute are the statutory allowances for profit and general expenses pursuant to section 402(c)(1). The trial judge found that the proper allowance for profit and general expenses was 33.4 percent as claimed by appellees rather than 19.1 percent which was the figure used by the Government in appraising the merchandise. The appellate term affirmed the decision of the trial judge.

It is claimed that the Customs Court erred in finding and holding that the proper dutiable values of the imported merchandise are equal to various U.S. selling prices less one percent cash discount, less 33.4 percent allowance for general expenses and profits, less transportation and insurance, less customs duties, on the basis of United States value, *supra;* in not finding and holding that the proper dutiable values are equal to various U.S. selling prices, less one percent cash discount, less 19.1 percent allowance for general expenses and profits, less transportation and insurance, less duties, under section 402(c), *supra;* in finding and holding that the appraiser, in appraising the imported merchandise, improperly applied section 402(g), Tariff Act of 1930, as amended, in disregarding the general expenses and profits of the importers herein; in finding and holding that the appraiser, in appraising the imported merchandise, and specifically disregarding the general expenses and profits of the importers herein, predicted his action solely upon the relationship of the importers and their suppliers

in Switzerland; in not finding and holding that the general expenses and profits of the importers were not equal to an amount usually reflected in sales of merchandise of the same general class or kind as the involved merchandise in the market under consideration; in finding and holding that the general expenses and profit of Geigy Chemical Corp. represented the general expenses and profit usually made, in connection with sales in the United States market of imported merchandise of the same class or kind as the involved merchandise; and in not finding and holding that 19.1 percent of the U.S. selling prices, less one percent cash discount, represented the general expenses and profits usually made, in connection with sales in the United States market of imported merchandise of the same class or kind as the imported merchandise.

APPEAL 75–9.—Dana Perfumes Corp. *v.* United States.—TOILET PREPARATIONS (CANOE COLOGNE), REAPPRAISEMENT OF—GENERAL EXPENSES—COST OF PRODUCTION. Appeal from A.R.D. 320.

Merchandise described as "Canoe Cologne * * * No. 8228" imported from France was appraised on the basis of cost of production as defined in section 402a(f), Tariff Act of 1930, as amended, by the Customs Simplification Act of 1956, at 3.40 French francs per bottle, plus packing. Plaintiff-appellant does not dispute the basis of appraisement but contends the proper dutiable value should be 2.43 French francs per bottle, net packed. The difference in the values is based upon the amounts utilized for general expenses and profit as prescribed in section 402a(f), *supra*. The trial judge found that 2.43 French francs per bottle represented the correct value of the involved merchandise. The appellate term reversed the decision below concluding "in view of the disparity between the general expenses attributed to cost of production in the home market and that for export, an explanation or accounting therefor or other evidence establishing that the claimed figure represents the usual general expenses for such or similar merchandise is required. Such evidence is lacking and since the appraised value relating to general expenses was arrived at contrary to law the court therefore reverses the decision of the trial court and remands the matter for further evidence which would permit a proper finding of cost of production."

It is claimed that the Customs Court erred in reversing the decision of the trial court; in failing to hold the proper amount to be included for usual general expenses under section 402a(f)(2), Tariff Act of 1930, as amended, was 0.56 francs per bottle of "Canoe cologne, #8228"; in failing to hold that the importer established through plaintiff's exhibit 2 and the stipulation between the parties the usual general expenses of such merchandise; in failing to hold that the proper

amount to be included for the profit ordinarily added under section 402a(f)(4), *supra*, was 1.67 francs per bottle; in holding that the actual general expenses and profit of the manufacturer could not be utilized unless evidence was introduced to establish both the usual general expenses of such or similar merchandise and the profit ordinarily added, in the case of merchandise of the same general character by manufacturers or producers in the country of manufacture or production who are engaged in the production or manufacture of merchandise of the same class or kind; in holding that the importer was required to explain or account for the disparity between the general expenses attributed to cost of production in the home market and that for export; in failing to hold that the factor of 96.7% is the correct percentage to be added for profit and that said factor, as determined by the appraising official, was presumptively correct; and in failing to hold that the stipulation of facts entered into between the parties established the manner for determining the usual profit ordinarily added in the manufacture of this merchandise.

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